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No. 93

In the Supreme Court of the United States

October Term, 1950

Hyman E. Sacks, Jr., petitioner,

v.

United States of America

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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No. 92

HUBERT N. SELBY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of New York (R. 136a) is reported at 161 F. Supp. 689. The opinion of the Court of Appeals (R. 235a; Pet. App., p. 11) is reported at 264 F. 2d 632.

JURISDICTION

The judgment of the Court of Appeals was entered on March 6, 1959. The petition for a writ of certiorari was filed on June 4, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the decision of the District Court, which was subsequently affirmed by the Court of Appeals, failed to make the findings of fact and conclusions of law required by Admiralty Rule 46½.

RULE INVOLVED

Admiralty Rule 46½, 28 U.S.C., provides:

> Rule 46½. *Findings of fact and conclusions of law.*
>
> In deciding cases of admiralty and maritime jurisdiction the court of first instance shall find the facts specially and state separately its conclusions of law thereon; and its findings and conclusions shall be entered of record and, if an appeal is taken from the decree, shall be included by the clerk in the record which is certified to the appellate court under rule 49.

STATEMENT

In August 1946, while serving as a seaman on the S.S. *Kyska,* the petitioner began hemorrhaging and spitting blood. He was put ashore at Bremen, Germany, and was diagnosed to be suffering from pulmonary tuberculosis. The petitioner was taken back to the United States where he was hospitalized and treated until he was ready to take up employment ashore. He has subsequently married, is the father of two children, and, today, "within obvious limits his life can be thought of as normal, and he is able to pursue a gainful occupation" (R. 148a).

On June 22, 1951, the petitioner brought this admiralty action against the United States in the District Court for the Eastern District of New York

to recover damages under the Jones Act, 46 U.S.C. 688, claiming that he had been "unduly exposed to contagion and illness" while serving as an oiler during two voyages on the S.S. *Rockland Victory* in 1946. The libel alleged that the United States, the owner and operator of the vessel, had been negligent in failing to provide him with a safe place to work and that the ship was unseaworthy as operated and maintained (R. 136a).

The petitioner had signed on the *Rockland* at the port of New York in January of 1946, knowing that the ship was to carry a considerable cargo of horses from Houston, Texas, to Italy (R. 145a). With respect to this voyage, he testified that the horses' stables were not cleaned, that dead horses were not promptly thrown overboard, and that the live horses coughed and sneezed into the air (R. 118a). In spite of these allegedly intolerable conditions, on April 22, 1946, the petitioner signed on for a second voyage aboard the *Rockland,* which was to carry mules and mares from Houston to Greece (R. 121a). As to this voyage, the petitioner testified that the stalls were not cleaned out (R. 125a). In complaining of the conditions aboard the *Rockland,* the petitioner made no claim that the horses had, in any way, infected him, or transmitted a disease to him (R. 142a). He relied entirely on the theory that, as a result of these alleged conditions, he lost his appetite and became undernourished, whereby his resistance was so lowered that the tuberculosis germs which are dormant in the bodies of most persons succeeded in disabling him (R. 139a).

Every major allegation made by the petitioner was contested. The District Court found the petitioner's testimony in general "so vague and indefinite that it is not to be relied upon" (R. 139a), one of his allegations "wrong" (R. 146a), and another "rendered suspect" (R. 146a). On the question of causation, the court found that the petitioner had presented only the "surmise" of experts that tuberculosis *could* have arisen in the alleged manner (R. 150a). The District Court concluded that the petitioner had entirely failed to sustain his burden of proof and dismissed the libel. The Court of Appeals affirmed unanimously.

ARGUMENT

The petitioner's claim that the District Court failed to comply with Admiralty Rule 46½ is wholly without merit. Compliance with the rule does not require the making of separately itemized findings of fact and conclusions of law. The requirement is only that the opinion of the trial judge clearly state the findings and conclusions upon which the judgment is based. *Hecht, Levis & Kahn* v. *The S.S. President Buchanan*, 236 F. 2d 627 (C.A. 2); *United States* v. *Ladd*, 193 F. 2d 929 (C.A. 4); *Koehler* v. *United States*, 187 F. 2d 933 (C.A. 7). In an exhaustive opinion which occupies 16 pages of the Record, Judge Byers reviewed the evidence at length and carefully disposed of each contention which petitioner had raised (R. 136a–151a). The petitioner's allegation that the District Court refused to pass "upon the material and basic issues involved"

is belied at the outset by the fact that the Court of Appeals was able to conduct an intelligent review of the lower court proceedings, and that it did so without the slightest suggestion that the District Court findings were inadequate (R. 235a–238a). Indeed, at least insofar as the opinion of the Court of Appeals discloses, it appears that the only argument seriously urged in that court by the petitioner was that the findings of the District Court were clearly erroneous (R. 238a).

The petitioner urges that *both* lower courts failed to pass upon the material issues litigated at the trial. In listing these "material issues" in his petition, he makes reference to issues which were either decided squarely against him in the lower courts or which are but refined, almost illusory, variations on the theme which was rejected by these courts. The petitioner's claim of negligence and unseaworthiness predicated upon acceptance and transportation of sick and dying horses is merely a rephrasing of his allegation that he was compelled to live in proximity with sick horses and with dead horses, whose bodies had not been discharged. With respect to this allegation, the District Court held that the petitioner had utterly failed to sustain his burden of proof. The court found that the petitioner's evidence was inadequate to establish that horses had occupied a significant area of the deck for a significant period of time (R. 138a). It found that, contrary to the petitioner's testimony, dead horses had been regularly discharged on weekends, as well as weekdays (R. 146a). It found that the petitioner had failed to prove that this degree of

mortality is not an expectable incident of the transportation of animals (R. 149a), and had not established by the weight of credible evidence the lurid conditions aboard the *Rockland* which he had alleged so graphically (R. 151a). Since the petitioner failed to prove the existence of conditions dangerous to human health, it follows inevitably that he failed to prove negligence or unseaworthiness in respondent's accepting the horses for transportation. The District Court concluded, specifically, that unseaworthiness had not been proven (R. 149a) and that negligence had not been proven (R. 151a).

Although the District Court rejected the petitioner's description of the conditions on board the *Rockland* and thus was not compelled to consider the issue of proximate cause, it, nevertheless, ruled that the petitioner had not established his theory of causation. The court pointed out that none of the petitioner's medical experts were familiar with the state of his physical condition before he had signed on the *Rockland* (R. 150a) and that the medical testimony concerning the interpretation of a pre-*Rockland* X-ray was conflicting (R. 142a). It found the testimony of the petitioner's experts "at the most an expression of a belief based upon the assumption of his accurate statement of conditions on the ship, that his tuberculosis *could* have arisen on the first voyage" (R. 150a).[1] Finally, the court concluded that the

[1] Indeed, there was no convincing proof that the petitioner did not have tuberculosis before he joined the S.S. *Rockland Victory* and that what happened thereafter was not simply the normal progress of the disease one would expect to occur so long as he continued working and departed from any course of conduct other than rest.

petitioner's proof had failed on several issues, including that of causation (R. 151a).

The Court of Appeals reviewed the findings of the District Court and held that they were not clearly erroneous. Of course, with the issue of liability decided adversely to the petitioner, there was no need for findings on the issue of damages.

Court rules providing for findings of fact and conclusions of law require only that findings be sufficient to indicate the factual basis for the court's ultimate conclusions, and do not impose the requirement that a finding be made on every issue which is conceivably relevant, cf. *Kelley* v. *Everglades Drainage District,* 319 U.S. 415. More specifically, conclusions and findings laid down pursuant to Admiralty Rule 46½ must be strictly limited to those upon which the judgment is based and should not be discursive. *Petterson Lighterage & T. Corp.* v. *New York Central R. Co.,* 126 F. 2d 992 (C.A. 2); *Hecht, Levis & Kahn* v. *The S.S. President Buchanan,* 236 F. 2d 627 (C.A. 2). The opinion of the District Court in the instant case complied with this standard. It determined the basic issues concisely and completely.

Although the petition ostensibly complains of the failure of the lower courts to make adequate findings, its thrust seems to be equally directed at advocating the proposition that the findings of fact which *were* made were erroneous. Such a contention clearly cannot form a basis for review of this case. In reviewing the findings of a trial court, sitting without a jury in admiralty, the review of the Supreme Court, as well as that of the Court of Appeals, is limited to

the question of whether the findings are clearly erroneous. *McAllister* v. *United States*, 348 U.S. 19. The trial court's findings are particularly secure where, as in this case, determination of the crucial issues hinges largely on the credibility of witnesses. *United States* v. *Oregon Med. Soc.*, 343 U.S. 326, 332. The District Court considered the petitioner's allegations, heard his testimony and that of his witnesses, and concluded that such facts had not been established as would render the United States liable for the petitioner's unfortunate disease. The Court of Appeals upheld these findings. There remain no issues worthy of this Court's consideration.

In the event that certiorari should be granted here, the Government would argue, in addition, as it did in the courts below, that the petitioner's claim is barred by the statute of limitations 46 U.S.C. 745. We do not develop the point further here since we believe that the Court should deny certiorari for the other reasons herein set forth.

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[2] In addition, the two court rule is fully applicable in the instant case. *Comstock* v. *Group of Investors*, 335 U.S. 211, 214; *Corn Products Co.* v. *Commissioner*, 350 U.S. 46, 51.

[3] This issue was tacitly decided by the District Court against the United States. The Court of Appeals' opinion did not refer to it. The relevant facts concerning this issue appear at R. 142a–144a and 216a–229a.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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HUBERT N. SELBY, JR.,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The brief for the United States in opposition to the petition for a writ of certiorari states at page 7:

> "The Court of Appeals reviewed the findings of the District Court * * *."

This is not so. That is the very purpose of the petition.

This writ of certiorari is prayed for because the Court of Appeals did not review the findings of the District Court.

The petitioner did not, in fact, have the benefit of an appeal.

Furthermore, an unwarranted license has been assumed by respondent in taking a part of a statement out of context on page 6 of its brief:

> "It found the testimony of the petitioner's experts 'at the most an expression of a belief based upon the assumption of his accurate statement of conditions on the ship, that his tuberculosis could have arisen on the first voyage'."

This is not what the evidence showed. The uncontradicted evidence by petitioner's doctors established the proximate causation, which evidence was misquoted by the trial court.

The evidence was that the tuberculosis *was* caused other than as the trial court stated that it *could* have been caused.

We are fully aware of the fact that when a litigant has had the benefit of a trial and an appeal, that he must possess compelling reasons for justifying his application for a writ.

We know of no better reason than the fact that a litigant was denied his rights to a trial on the merits.

The District Court did not pass on the most important basic ground of recovery, the transportation of sick and dying horses, and the Court of Appeals for the Second Circuit did not review this question and ignored it completely in its decision.

Petitioner accepts the two court holdings mentioned on page 8 of respondent's brief, citing *Comstock* v. *Group of Investors*, 335 U. S. 211, 214; *Corn Products Co.* v. *Commissioner*, 350 U. S. 46, 51. The decision of the lower court and the decision of the Court of Appeals for the Second Circuit do not comply with these decisions because petitioner did not have two trials, he was denied even one on the merits.

Respectfully submitted

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